IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1975

NO. 75-1690

T. M. "JIM" PARHAM, Individually and as Commissioner of the Department of Human Resources, W. DOUGLAS SKELTON, Individually and as Director of the Divison of Mental Health and W. T. SMITH, Individually and as Chief Medical Officer of Central State Hospital,

Appellants,

v.

J. L. AND J. R., Minors, individually and as representatives of a class of persons similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA

MOTION FOR PLENARY REVIEW OR IN THE ALTERNATIVE TO AFFIRM

DAVID GOREN
NANCY R. LINDBLOOM
GERALD R. TARUTIS
STEVEN GRANBERG
653 Second Street
Macon, Georgia 31201

JOHN L. CROMARTIE, JR.
Suite 909
15 Peachtree Street, N.E.
Atlanta, Georgia 30303

JOSEPH J. LEVIN, JR.
Counsel of Record
for Appellees
PAMELA S. HOROWITZ
SOUTHERN POVERTY LAW CENTER
1001 S. Hull
Montgomery, Alabama 36101

COUNSEL FOR APPELLEES

June, 1976

INDEX

CITATIONS

CASES:

CITATIONS

CASES: Page

STATUTES:

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975

NO. 75-1690

T. M. "JIM" PARHAM, Individually and as Commissioner of the Department of Human Resources, W. DOUGLAS SKELTON, Individually and as Director of the Division of Mental Health and W. T. SMITH, Individually and as Chief Medical Officer of Central State Hospital,

Appellants,

v.

J. L. AND J. R., Minors, individually and as representatives of a class of persons similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE MIDDLE
DISTRICT OF GEORGIA

MOTION FOR PLENARY REVIEW OR
IN THE ALTERNATIVE TO AFFIRM

Appellees, pursuant to Rule 35 of the Rules of the Supreme Court, move this court to grant plenary review of this case.

In the alternative, appellees, pursuant to Rule 16 of the Rules of the Supreme Court, move that final judgment and decree of the District Court be affirmed on the ground that the question is so clearly correct as not to warrant further argument.

OPINION BELOW

The opinion and judgment of the District Court

is not yet reported. A copy is contained in Jurisdictional Statement, Appendix A, and Appendix B respectively.[1/]

The order of the District Court denying appellants' motion to stay is not yet reported. A copy is attached as Appendix A to this Motion.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Jurisdictional Statement.

QUESTIONS PRESENTED

1. Whether a statute which permits parents or guardians to place children in state mental institutions without any prior procedural safeguards for an indeterminate period of time, is violative of the Due Process clause of the Fourteenth Amendment, and is therefore unconstitutional.

2. Whether a statute which allows the state upon application of a parent or guardian to admit and detain a child in a state mental institution for an indefinite period of time without any procedure for initial and periodic consideration of the necessity of confinement is violative of the Due Process clause of the Fourteenth Amendment, and is therefore unconstitutional.

STATEMENT

Two minors, J. L. and J. R., filed a class action on October 24, 1975, requesting the U. S. District

---

[1/] Since the opinion is not reported, all references in this motion will be to page numbers of the Appendix to the Jurisdictional Statement and will be cited as J.S.A.

Court to declare unconstitutional Acts 1969, pp. 505, 517, informally codified as Ga. Code Ann. 88-503.1(a), as being in violation of the Due Process clause of the Fourteenth Amendment and to enjoin its enforcement.

A parent or guardian, pursuant to 88-503.1(a), can place a child in a state mental health facility for observation and diagnosis for an unlimited period of time. If found to have evidence of mental illness and to be suitable for treatment, formal detention can exist for an indefinite period of time. J. L. and J. R. had each been detained in excess of five years. Children placed in this fashion are designated as "voluntary" patients by the statute.

Plaintiffs urged that their constitutional rights to due process were violated by their commitment to and indefinite confinement in state mental institutions (1) without any prior meaningful and complete opportunity to be heard and (2) without initial and periodic review of the necessity of confinement.

On November 15, 1975, a three judge court was convened pursuant to 28 U.S.C. 2281, 2284, and heard oral argument on the legal issues. Oral testimony was taken by deposition of 23 expert and lay witnesses. The court visited two state mental institutions and reviewed extensive exhibits.

On February 26, 1976, the court issued its unanimous opinion. The opinion found that applications for hospital admission are in practice made either by parents or county welfare departments as guardians. J.S.A. at 39a. Despite the good intentions of many parents,

others utilize the procedure to abandon their children, treating mental hospitals as "dumping grounds." J.S.A. at 40a, 50a.

The observation stage of the admission process results in children being confined or placed in a hospital behind locked doors. J.S.A. at 41. The physician who decides upon detention is subject to error and must utilize a standard "as indefinite and elusive to the psychiatrist... as it is to the layman." J.S.A. at 53a, 42a-43a.

In practice the minor child once committed can be released only if the hospital and parent or guardian agree. Due to the absence of alternative placements, a Superintendent cannot release a child without willing and able parents; the absence of parents ready to "accept their child is unfortunately a normal situation." J.S.A. at 44a-45a. The state admits there are minors in the hospital who do not need to be there. J.S.A. at 44a-45a.

The state was made aware of these conditions by a study commission in 1973, but has failed to take any action. J.S.A. at 52a.

The District Court noted that the liberty interest of juveniles in the context of these facts was strikingly similar to the losses sustained by a juvenile in a delinquency proceeding. J.S.A. at 48a. The court found that the Due Process clause was applicable to confinement and detention under the statute.

The court did not prescribe those elements of due process necessary under the Fourteenth Amendment. Rather the defendants were required to either utilize

existing state procedures containing procedural safeguards or to release the members of the class.

Similarly the Court ordered the defendants to "proceed as expeditiously as is reasonably possible" to provide non-hospital resources deemed by defendants most appropriate and to place a specified and limited identifiable subgroup in a non-hospital setting as "soon as reasonably appropriate." J.S.A. at 54a.[2/]

The statute was declared unconstitutional and its enforcement enjoined.

REASONS FOR PLENARY REVIEW

The issues presented in this case are similar to those already before this Court. Kremens v. Bartley, prob. juris. noted, 44 U.S.L.W. 3525 (1976). Although both district courts have held due process applicable to the "voluntary" commitment of juveniles to mental institutions, the similarity ends there.

In Bartley v. Kremens, 402 F. Supp. 1039 (E.D. Pa. 1975) the District Court found that a state statute and regulations providing limited safeguards failed to meet the constitutional standard of the Due Process clause of the Fourteenth Amendment. The District Court specified in detail the procedural elements necessary to commit juveniles.

[2/] The term "optimally appropriate treatment setting" is the appellants characterization initially expressed in a letter to the court. J.S.A. at 21a. The District Court did not adopt this language and it appears nowhere else in the opinion.

The case at bar is different in several respects. First, no due process procedures of any kind existed. J.S.A. at 46a-47a. Second, all children up to age 18 were confined and detained without resort to any meaningful hearing. J.S.A. at 53a.

Finally, the District Court noted the existence of two other systems (juvenile courts and courts of Ordinary) which do provide procedural protections and through which the state could accomplish the same purpose it sought to achieve in the constitutionally deficient statute.

Specifically the court found some due process was required. Appendix at 4a. A careful analysis of existing juvenile and mental health statutes established that procedural rights to notice, hearing, counsel and an impartial tribunal were present. J.S.A. at 33a-38a. Post-commitment hearings were limited to non-emergency cases, and special provision was made for emergency detention. All juveniles were treated equally. Furthermore, these protections were previously established by the legislature and not created by the court.

Thus the court found the challenged statute supplied not the flexible due process the situation demanded, but instead absolutely no due process. J.S.A. at 53a. It then required the state to utilize its own pre-existing court systems which did provide adequate due process protections for children in plaintiffs' class.

> [T]o begin to utilize this revised juvenile court code for mentally ill children will be only to do in 1976 what the legislature of this state provided to be done beginning in 1971. Appendix at 7a.

That probable jurisdiction was noted in Kremens

evidences the importance of the question presented there and in this case. The significance of the marked difference between the cases enumerated above warrants the granting of plenary review in this case.

ARGUMENT TO AFFIRM

The Georgia statute results in the commitment of minors below 18 to state mental institutions upon application of their parents or guardians. There are no meaningful procedures to determine if the alleged mentally ill minor in fact requires commitment. Confinement is indefinite. Release questionable. J.S.A. at 46a.

Although these issues are substantial, Kremens v. Bartley, prob. juris. noted, 44 U.S.L.W. 3525 (1976), the determination that due process safeguards are applicable to this restraint of liberty is so clearly correct as to require summary affirmance.

The involuntary commitment of an individual cannot be accomplished by the state without due process of law. O'Connor v. Donaldson, ___U.S.___, 95 S.Ct. 2486, ____, 45 L.Ed.2d 396, 410 (1975), citing Specht v. Patterson, 386 U.S. 605, 608 (1967), and Application of Gault, 387 U.S. 1, 12-13 (1967). This court has consistently required due process requirements to protect the constitutional rights of those whose liberty is threatened in this manner. Baxstrom v. Herold, 383 U.S. 107 (1966); Jackson v. Indiana, 406 U.S. 715 (1972); Humphrey v. Cady, 405 U.S. 504 (1972).

The protection of liberty accorded by the Fourteenth Amendment is applicable to children as well as adults. Application of Gault, 387 U.S. 1, 13 (1967);

Kent v. United States, 388 U.S. 541 (1966); Haley v. Ohio, 332 U.S. 596 (1948).

The denomination of the action taken as civil or criminal, voluntary or involuntary cannot be used to bypass the protection accorded the juvenile. See: Specht v. Patterson, 386 U.S. 605 (1967). Rather a court must eschew the label of convenience attached by the state so the commitment process can be candidly appraised. Breed v. Jones, 421 U.S. 519, 529 (1975) citing Application of Gault, supra, at 50 and In re Winship, 397 U.S. 358, 365-366 (1970).

Similarly the alleged purpose for the restriction of liberty, be it rehabilitation or treatment, cannot be utilized to justify a scheme devoid of due process. Application of Gault, supra, at 21.

The specific safeguards required by the Due Process clause are determined by a balancing of the interest at stake, but at a minimum include notice and hearing. Powell v. Alabama, 287 U.S. 45 (1932). The Georgia legislature has determined what procedures apply to mental commitment and the commitment of juveniles in particular. Ga. Code Ann., Titles 88-5 and 24A. The court found these procedures provide the minimal safeguards not present in the challenged statute. J.S.A. at 33(a)-38(a). The opinion requires nothing more than that which the state already utilizes. It simply foreclosed an unconstitutional procedure. Such a ruling is clearly correct.

The government may interfere with the lives of its citizens if its purpose is substantially legitimate. However, it cannot use such broad means of interference so as to "stifle fundamental liberties when its ends can

be more narrowly achieved." Shelton v. Tucker, 369 U.S. 479, 488 (1960).

The civil commitment of an individual involves a massive curtailment of liberty. Humphrey v. Cady, 405 U.S. 504, 509 (1972); O'Connor v. Donaldson, ___U.S.___, 95 S.Ct. 2486, 45 L.Ed.2d 396 (1975). This infringement is magnified in the case of a child. It can result in social ostracism, In re Ballay, 482 F.2d 648, 667-69 (D.C. Cir. 1973), and severe emotional and psychic harm. Matthews v. Hardy, 420 F.2d 607, 611 (D.C. Cir. 1969).

> [D]ue Process requires the nature and duration of the commitment bear some reasonable relation to the purpose for which the individual is committed. Jackson v. Indiana, 406 U.S. 715, 738 (1972); See Application of Gault, supra, at 27, 28 n. 41.

This principle of the "least restrictive alternative" is applicable to civil commitment of the mentally ill. Lake v. Cameron, 364 F.2d 657 (D.C. Cir. 1966); Covington v. Harris, 419 F.2d 617 (D.C. Cir. 1969); Lessard v. Schmidt, 349 F.Supp. 1078 (E.D. Wisc. 1972), vacated and remanded on other grounds, 414 U.S. 473(1974), on remand, 379 F.Supp. 1376 (E.D. Wisc. 1974), vacated and remanded on other grounds, 95 S.Ct. 1943 (1975).

The District Court reached a similar conclusion in the face ot overwhelming evidence that the fundamental liberties of children were being broadly stifled with no relation to the purpose of commitment.[3] J.S.A. at 54a. Such a hold-

---

[3] By the Appellants own admission, 46 children do not require hospitalization. J.S.A. at 54a. This condition has existed for some children for over three years. J.S.A. at 6a.

ing so clearly conforms to existing precedent that it should be summarily affirmed.

Neither is the role of the family diminished by the requirement of due process. The important role accorded to the support of the family and parental control has always been subject to limitation. Reynolds v. United States, 95 U.S. 145 (1878)(polygamy); Prince v. Massachusetts, 321 U.S. 150 (1944); Wisconsin v. Yoder, 406 U.S. 205, 233-234 (1971) (parental power limited "if it appears that parental decisions will jeopardize the health or safety of the child or have a potential for significant social burdens.")

Although this case does not involve the conflict of state and parent/child contained in the above decisions, it is directly in line with their holdings. At issue is the power of the parent and state to indefinitely commit a child to a state institution. Such a decision is clearly one which can jeopardize the health of the child and has potential for significant social burdens. J.S.A. at 46a. No characterization of horrors by the defendants can transcend this well settled principle into an issue conflicting with a decision of this Court.

THERE IS NO CONFLICT AMONG THE COURTS

Despite the great shift in precedent alleged by appellants, there are in fact no cases in conflict with the District Court's opinion. Almost eight years ago the Tenth Circuit Court of Appeals found that the Due Process Clause was applicable in the commitment of a minor to a training school for the epileptic and

feeble minded. Heryford v. Parker, 396 F.2d 393 (10th Cir. 1968). District courts in Tennessee and Wisconsin are also in accord with the holding of this case. Saville v. Treadway, 404 F.Supp. 430 (M.D. Tenn. 1974); Kidd v. Schmidt, ___F.Supp. ___ (E.D. Wis., August 15, 1975).

Similar cases are currently pending in federal courts. Poe v. Weinberger, C.A. No. 74-1800(D.D.C.)(Three-Judge Court)(class determined); Campbell v. Director of the Michigan Department of Mental Health, Civ. No. 572318 (E.D. Mich.).

One case is now pending review by this Court. Bartley v. Kremens, 402 F.Supp. 1039 (E.D. Pa. 1975), prob. juris. noted, sub. nom, Kremens v. Bartley, 44 U.S.L.W. 3525 (1976). However, that case is distinguishable from the instant decision. See pp. 5-7 herein and Appendix A.

CONCLUSION

For the foregoing reasons, appellees respectfully move this court to grant plenary review of this case or, in the alternative, to summarily affirm the judgment of the court below.

Respectfully submitted,

Joseph J. Levin, Jr.
COUNSEL OF RECORD FOR APPELLEES

June, 1976.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF GEORGIA

MACON DIVISION

Filed at 4:00 P.M.
Mar 17, 1976

/s/ Walter F. Doyle
Clerk, U.S. District Court

J. L. AND J. R., minors, individually and as representatives of a class consisting of all persons younger than 18 years of age, now or hereafter received by any defendant for observation or diagnosis and/or detained for care or treatment at any facility within the State of Georgia, pursuant to 1969 Georgia Laws pp. 505-517, informally codified as Georgia Code Annotated § 88-503.1,	CIVIL ACTION NO. 75-163-MAC
Plaintiffs,	
-v-	
JAMES PARHAM, individually and as Commissioner of the Department of Human Resources, DOUGLAS SKELTON, individually and as Director of the Division of Mental Health and W. T. SMITH, individually and as Chief Medical Officer of Central State Hospital,	
Defendants.	

Defendants Parham, Skelton and Smith, individually and as officials of the Department of Human Resources of the State of Georgia, have moved this district court of three judges[1] to stay its entire order of February 26, 1976, and the judgment entered March 11, 1976, pending their appeal to the Supreme Court of the United States. For grounds they urge:

> 1. A stay is necessary in order to maintain the status quo and to prevent the issues from becoming moot during the appeal.

---

[1]This court as originally constituted consisted of Circuit Judge Bell, Senior District Judge Bootle and District Judge Owens. Following the court's decision of February 26, 1976, Circuit Judge Bell's resignation became effective on March 1, 1976. Upon notification of the intention of the defendants to file this motion the court was reconstituted by Chief Judge Brown to consist of Circuit Judge Morgan,

[1](Continued) Senior District Judge Bootle and District Judge Owers.

"2. A stay is necessary in order to protect the public interest during the appeal of the court's order.

"3. A stay is necessary in order to prevent irreparable injury to the members of the plaintiff class during the appeal of the court's decision."

Defendants' motion filed on March 10, 1976, was heard on March 11, 1976. Evidence presented and arguments read and heard having been considered, this constitutes the court's order on defendants' motion.

The defendants by brief and in argument suggest that they satisfy the four criteria which traditionally are considered by trial courts in deciding whether or not to grant a stay pending appeal, to wit: "(1) the applicant must establish a strong likelihood of success on the merits; (2) the applicant must show that he will be irreparably harmed if the stay is not granted; (3) the applicant must show that the other party will not be irreparably harmed by a stay; and (4) the applicant must show that the public interest will be served by the stay." Defendants' brief in support of motion.

The defendants first concede the obvious -- this district court of three judges would not have unanimously decided that children cannot be voluntarily committed and detained in Georgia's mental hospitals pursuant to this statue[sic] which contains absolutely no due process protection, if it were of the opinion that on appeal the defendants are likely to convince a majority of the Supreme Court to hold to the contrary. Having so conceded, defendants suggest that nevertheless this is a new, novel issue similar to Kremens v. Bartley, 402 F.Supp. 1039 (E.D. Pa. 1975), which was stayed by the Supreme Court on December 15, 1975, and that said stay is a signal that they may indeed prevail upon appeal.

The court secured a copy of the motion for a stay in Kremens as considered and granted by the Supreme Court and again read the

decision that was being appealed. Kremens it is first noted, considers whether or not a statutory procedure and regulations pertaining thereto which collectively contain some due process type protection for children described in the dissent of Judge Broderick as follows:

> "Under the Pennsylvania Act and regulations, application for voluntary admission or commitment to a facility may be made by a parent, guardian or individual standing in loco parentis to the person to be admitted, if such person is eighteen years or younger. In order to be admitted or committed to an institution, any person aged 18 and younger must first be referred from a recognized medical facility, Mental Health/Mental Retardation therapist or Mental Health Agency. Such referral must be accomplished by a psychiatric evaluation and a report which states with specificity the reasons that the child requires institutional care. After such referral, the director of the facility to which the parents seek to have their child admitted must then conduct an independent examination of the child in order to determine whether the child is in need of institutional care or observation. If the director's independent examination disagrees with the referring professional's opinion, the child cannot be institutionalized. In the case of a voluntary commitment under §403 of the Act, an acceptance for commitment may not exceed thirty days without a successive application for continued voluntary commitment for an additional thirty day period. In the case of juveniles 13 years of age and older, within 24 hours of admission to the institution, the juvenile must be given written notification which he signs and which is to be fully explained to him and which states that he will be furnished with counsel to represent him. Should a juvenile who is 13 years of age or older object, either orally or in writing, to remaining in the institution, the director, if he feels it is necessary for the youth to remain, may continue the institutionalization for two business days, during which time notification shall be made to the applicant and the referral unit so that either party may institute a §406 proceeding, which is the statutorily required court hearing for an involuntary commitment. During that same two day period, the director must obtain counsel to represent the juvenile. The juvenile's counsel is then furnished with the evaluation of the juvenile by the referral unit, a psychiatric evaluation from the institution, and a written report of the reasons that the institution feels that institutionalization is required.
>
> "The effect of the Act and the regulations pro-

> mulgated thereunder is that two independent medical opinions must concur in a recommendation of institutionalization before a minor can be voluntarily admitted. In the case of juveniles 13 and over, upon their objections to remaining in the institution, future institutionalization must proceed pursuant to the civil court commitment provisions of the Act. (Section 406). Section 406 provides the procedure for an involuntary civil court commitment and requires the filing of a petition with the Court of Common Pleas, pursuant to which the Court issues a warrant requiring the allegedly ill person to be brought to Court for a hearing. Counsel appointed for the juvenile represents him at the hearing before the Court of Common Pleas. After the hearing, the Court may order an examination by two physicians or order commitment for a period not to exceed ten days for an examination, after which commitment may be ordered by the Court. Plaintiffs do not attack the constitutionality of the civil court commitments under §406 of the Act which follow the above outlined procedure." (footnotes omitted). Kremens, supra, dissent of Judge Broderick, pp. 2-5.

meets due process requirements. The Kremens court decided that these protections are constitutionally inadequate and went further to decide in minute detail what protections are required. Having spelled out every detail the court as to thousands of children in both mental health and mental retardation facilities in Pennsylvania gave the defendants 120 days to initiate and complete recommitment or discharge procedures. Unlike Kremens the decision of this court is only that some due process protection is required for children to be voluntarily committed to a mental hospital. Unlike Kremens this court's order requires that as to only those 154 children (Dr. Skelton's affidavit in support of motion) who were in defendants' custody on January 31, 1976, proceedings be just commenced -- not commenced and completed -- in one of Georgia's 159 juvenile courts or one of Georgia's 159 courts of Ordinary within 60 days from the court's order of February 26, 1976. In chambers on January 8, 1976, the defendants were advised that the court's order would allow this 60 day period so in reality they have had an additional 48 days within which to commence such proceedings. Since Georgia's juvenile court system in fiscal year

1974 disposed of 48,116[2] juvenile cases, 154 additional cases scattered throughout this entire state and commenced over a sixty day period should not create an extraordinary problem for the fine juvenile court system that we have in this state. That Kremens and its particular facts demonstrated a crying need for a stay, does not in any way indicate a similar crying need in this case the facts of which are totally different.

To demonstrate irreparable harm to the defendants they assert that while they as state officials will not be harmed, the people who are served by the State's mental health program will be harmed by the monetary cuts that will have to be made in some services to fund the creation and operation of non-hospital facilities ordered by the court. As the Supreme Court of Georgia reminded all state officials on December 4, 1975, in the case of Busbee v. Georgia Conference, American Association of University Professors, 235 Ga. 752, ___S.E.2d___ (1975), even the failure of the legislature of this state to appropriate money for a particular purpose does not lessen the legal obligation of state officials to perform their lawful duties using money available for other purposes.

While the defendants did confer with the governor and legislative leaders in January 1976 in response to the court's request that they do so and while Dr. Skelton's affidavit shows that they then said funds were unavailable because they among other things, were of the "opinion that the regional hospitals were offering appropriate treatment for children" (February 26 Order at 18), it now appears that the defendants between February 26, 1976, and the adoption of a final budget about a week later did not request the legislature or the governor to appropriate money to cure and

---

[2]Second Annual Report, Administrative Office of the Courts of Georgia

correct the admitted inappropriate treatment of a large number of plaintiff children. Defendants say to even make such a request would be a futile effort. Until such time as each representative and senator and the governor of this state -- all fathers and grandfathers like the judges of this court -- have been told of the facts of this case and presented with a formal request for such funds and until such time as they have formally denied such funds, this court will not accept defendants' contention that it would be futile to make such a request. Having elected to refrain from communicating with the legislature, defendant state officials can decide[3] for themselves how to go about shifting funds to comply with the court's order.

While they steadfastly refuse to so admit, their failure to request funds could be due to their agreement with this court's opinion that the creation and operation of appropriate non-hospital facilities for these children in reality will save rather than cost money, i.e. hospital care costs some $40,000 per year per child whereas group home care costs some $7,500 per year per child; residential treatment care centers cost $12,000 per year per child.

As the evidence shows, the defendants agree that less stringent, non-hospital facilities are needed and are more appropriate but they want to provide them when they deem it advisable to do so, not when this court orders them to do so. To be compelled to do what admittedly should be done is not to be harmed.

Defendants say that plaintiff minor children are being harmed by the court's present order because that order is setting priorities for the Department of Human Resources. "As an alternative to allowing the court to set priorities for the Department

[3]The defendants are reminded that the Supreme Court declined to hear the plea they are now making in Department of Human Resources v. Burnham, 43 U.S.L.W. 3683 (U.S. June 30, 1975)(No. 74-904), denying cert. to 503 F.2d 1319 (5th Cir.). In that case, one of the

[3](Continued) questions presented in the petition for certiorari was:

> "Can federal district court, consistent with Eleventh Amendment, entertain suit by private individuals that would require state to re-order its priorities and increase its level of fiscal support for therapeutic or curative psychiatric treatment it provides in its mental institutions?"

43 U.S.L.W. 3459 (U.S. Feb. 18, 1975)(No. 75-904).

---

the Department can and will simply relinquish custody of the 46 children to the persons who placed the children with the Department." They would thus be deprived of their present care and treatment. A stay would prevent this harm and permit their present care and treatment to continue. Thus they conclude that a stay would help rather than hurt these children.

Implicit in this court's February 26, 1976, order is the court's considered opinion that every minute of unnecessary or inappropriate confinement and detention of a child in a mental hospital is a deprivation of liberty which affects him adversely and from the harmful effects of which he may never recover. That considered judgment has not changed.

The defendants go on to say that the public interest will be served by a stay because it is in the public interest to encourage and make it easy to admit children to mental hospitals rather than discouraging their admittance by requiring an adversarial juvenile court hearing. They also say it is in the public interest to not burden Georgia's juvenile court system with mentally ill children.

The evidence shows that in spite of requested permission to do so, defendants between January 8 and February 26, 1976, did not apprise their employees that they were expecting an adverse ruling and that it would soon be necessary to either petition juvenile court or assist parents in petitioning juvenile court to admit children in need of treatment. The confusion that de-

fendants say exists, the reported reluctance of some parents to process their children through juvenile court, results from a total lack of effort on defendants part to prepare their employees to communicate with parents and juvenile courts and to implement the order that they had been told was coming. Any parent who sincerely believes that his child is mentally ill and in need of treatment will not hesitate to have his child civilly committed through juvenile court or any other court process. Proof of this is that according to the defendants 1,111 children were involuntarily court committed during the fiscal years 1969 through 1976. Order of February 26, 1976 at 10.

The legislature of this state after careful study enacted an already described completely revised Juvenile Court Code in 1971. That code provided then and provides now for children who are mentally ill. 1933 Ga. Code Ann. § 24A-301 and 2601. That code contains already mentioned due process safeguards. To begin to utilize this revised juvenile court code for mentally ill children will be only to do in 1976 what the legislature of this state provided to be done beginning in 1971. The total of 22 children defendants estimate will be the subject each month of juvenile court proceedings will be a small addition to the said 48,116 juvenile cases handled on a yearly basis in Georgia's juvenile courts.

The State is being required to utilize an existing court system and to create non-hospital facilities that they themselves say they need and eventually want. Neither the utilization of juvenile courts nor the creation of such needed, wanted facilities will moot the issues upon appeal because if defendants prevail upon appeal, they will be free to return to the statutory system still deemed by this court to be violative of the Due Process Clause of the Fourteenth Amendment to the Constitution of the

United States. Allee v. Medrano, 416 U.S. 802, 811, 40 L.Ed 2d 566, 578, 94 S.Ct. 2191, ___, to wit:

> "It is settled that an action for an injunction does not become moot merely because the conduct complained of has terminated, if there is a possibility of recurrence, since otherwise the defendants 'would be free to return to ". . . [their] old ways."' Gray v. Sanders, 372 US 368, 376, 9 L Ed 2d 821, 83 S Ct 801; Walling v. Helmerich & Payne, Inc. 323 US 37, 43, 89 L Ed 29, 65 S Ct 11; United States v. W. T. Grant Co. 345 US 629, 632, 97 L Ed 1303, 73 S Ct 894; NLRB v. Raytheon Co., 398 US 25, 27, 26 L Ed 2d 21, 90 S Ct 1547; SEC v. Medical Committee for Human Rights, 404 US 403, 406, 30 L Ed 2d 560, 92 S Ct 577. . . ."

Defendants' arguments presented and considered are essentially a restatement of contentions made before the court issued its February 26, 1976, order. Then and now they have been considered and found wanting.

It is therefore the carefully considered judgment of this court that it is in the best interest of the plaintiff minor children that defendants' motion to stay pending appeal is denied.

IT IS SO ORDERED this 17th day of March, 1976.

/s/ Lewis R. Morgan
Lewis R. Morgan
United States Circuit Judge

/s/ W. A. Bootle
W. A. Bootle
Senior United States District Judge

/s/ Wilbur D. Owens, Jr.
Wilbur D. Owens, Jr.
United States District Judge